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Case No: A3/2013/0520 + 0521 + 0803

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION, COMPANIES COURT
REF: 10520OF2011

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 10/07/2013

IN THE MATTER OF FI CALL LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Before :

Lord Justice Maurice Kay, Vice President of the Court of Appeal, Civil Division
Lord Justice Richards
and
Lord Justice Briggs

- -

Between : **Claim No 10609/2011**

	GLOBAL TORCH LIMITED	**Appellant/Petitioner**
	- and -	
	APEX GLOBAL MANAGEMENT LIMITED & ors	**Respondents**
	and	
(1)	**GUARDIAN NEWS AND MEDIA LIMITED**	
(2)	**THE FINANCIAL TIMES LIMITED**	

And Between : **Claim No 10850/2011**

	APEX GLOBAL MANAGEMENT LIMITED	**Respondent/Petitioner**
	and	
(1)	**FI CALL LIMITED**	
(2)	**GLOBAL TORCH LIMITED**	**Respondent**
(3)	**HRH PRINCE ABDULAZIZ BIN MISHAL BIN ABDULAZIZ AL SAUD**	
(4)	**EMAD MAHMOUD AHMED ABU AYSHIH**	
(5)	**HRH PRINCE MISHAL BIN ABDUL AZIZ**	**Appellants/Respondents**
	and	
(1)	**GUARDIAN NEWS AND MEDIA LIMITED**	
(2)	**THE FINANCIAL TIMES LIMITED**	**Interveners**

- -

(Transcript of the Handed Down Judgment of
WordWave International Limited
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Official Shorthand Writers to the Court)

Mr Mark Warby QC and **Mrs R Zaffuto** (instructed by **Irwin Mitchell LLP**) for the **Appellants**
Mr Robert Howe QC, Mr Daniel Lightman, Ms Shaheed Fatima, Mr Paul Adams (instructed by **Howard KennedyFsi LLP**) for the **Apex parties**
Mr Guy Vassall-Adams (instructed by **Guardian News and Media Ltd** and **The Financial Times Limited,** the **Interested Parties**)

Hearing dates : 15, 16 May

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Approved Judgment

Judgment
As Approved by the Court

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Lord Justice Maurice Kay :

1. This appeal is concerned with whether certain proceedings in the Companies Court should be heard in private and with restrictions placed on access by media interests to court documents. The underlying litigation comprises two "unfair prejudice" petitions presented by rival factions in relation to the same company. On 13 February 2013, Morgan J (the Judge) refused an opposed application for a private hearing and associated restrictions. At the conclusion of a hearing in this Court on 15 and 16 May 2013, we announced that we were upholding his Order and would give our reasons at a later date. This judgment contains my reasons.

The background

2. The judgment below, [2013] EWHC 223 (Ch), contains at paragraphs 2-6, a helpful summary of the underlying litigation. I repeat it here.

3. Fi Call Ltd ("the Company") was incorporated on 23rd October 2009 under the Companies Act 2006 ("the 2006 Act"), as a private company limited by shares. The principal shareholders in the Company at the time of its incorporation, and since, have been Global Torch Ltd ("Global Torch") and Apex Global Management Ltd ("Apex"). Global Torch was incorporated in the British Virgin Islands. Apex was incorporated in the Seychelles and is wholly owned by a Jordanian businessman, Mr Almhairat, who at all material times has also been a director of the Company. Throughout, the other de jure director of the Company has been Mr Abu-Ayshih.

4. On 2nd December 2011, Global Torch presented a petition to the Companies Court in relation to the Company, pursuant to section 994 of the 2006 Act. The respondents to the petition were Apex, Mr Almhairat and the Company. Apex and Mr Almhairat will be referred to as "the Apex parties". It is Global Torch's case that the affairs of the Company were being conducted in a manner that was unfairly prejudicial to the interests of Global Torch. The principal relief sought was an order that Global Torch's shares be bought by the Apex parties, or one of them. Further and in the alternative, Global Torch sought an order winding up the Company on the just and equitable ground. In very brief summary, Global Torch alleged that Mr Almhairat in particular had misappropriated funds from the Company, had misconducted the Company's business in various ways, had failed to keep proper books and records, had failed to supply books and records to Global Torch and had blocked the holding of board meetings to discuss and to try to resolve matters. In particular, Global Torch pleaded that the relationship between it and Apex had been destroyed by the conduct of the Apex parties. It was pleaded that the destruction of the relationship had been exacerbated by false allegations of criminal conduct which the Apex parties had made about Global Torch and its shareholders; the allegations were said to be that Global Torch and its shareholders had used the Company for criminal purposes. It was also said that the Apex parties had threatened to publish these allegations to third parties.

5. Global Torch was given permission to serve the petition on the Apex parties out of the jurisdiction. The Apex parties have been duly served and do not dispute jurisdiction.

6. On 12th December 2011, that is 10 days after presentation of the Global Torch petition, Apex presented its own petition in relation to the Company, pursuant to section 994 of the 2006 Act. The respondents to the Apex petition were the Company,

Global Torch, HRH Prince Abdulaziz bin Mishal bin Abdulaziz Al Saud ("Prince Abdulaziz"), Mr Abu-Ayshih and HRH Prince Mishal bin Abdulaziz Al Saud ("Prince Mishal"). Global Torch, Prince Abdulaziz, Prince Mishal and Mr Abu-Ayshih will be referred to as "the appellants". Prince Abdulaziz is a director of and a shareholder in Global Torch. The Apex parties say that Global Torch is a corporate vehicle of Prince Abdulaziz. Prince Abdulaziz has also acted as Chairman of the Board of the Company notwithstanding that he is not a de jure director of the Company. The Apex parties say that Prince Abdulaziz has acted as a de facto and/or shadow director of the Company. Mr Abu-Ayshih is a private adviser to Prince Abdulaziz and is a director of and a shareholder in Global Torch, and a de jure director of the Company. Prince Mishal is the father of Prince Abdulaziz (they are members of the Saudi Arabian Royal Family) and the Apex parties make a number of allegations as to his involvement in matters said to be relevant to the Apex petition. The principal relief sought by the Apex petition is an order that one or more of the appellants purchase Apex's shares in the Company.

7. In its petition, Apex alleges that the appellants have caused the affairs of the Company to be conducted in a way which is unfairly prejudicial to the interests of Apex. It is said that Apex has lost trust and confidence in the willingness of the appellants to manage the Company in a fair and proper manner. The pleaded allegations against the appellants are:

i) Prince Abdulaziz acted irregularly in relation to the Company in that, although he has never been a director of the Company, he has acted as a de facto or a shadow director of the Company and has purported to act as a *de jure* director of the Company;

ii) Prince Abdulaziz and Mr Abu-Ayshih have been guilty of wrongdoing in relation to a transaction described as "the Beirut transaction";

iii) Prince Abdulaziz and Mr Abu-Ayshih have been guilty of wrongdoing in relation to a transaction described as "the Nairobi transaction";

iv) Prince Abdulaziz and Prince Mishal made various statements to Mr Almhairat which are highly relevant to Apex's case that the affairs of the Company have been conducted in a manner unfairly prejudicial to Apex;

v) In February and March 2010 there were four share sale agreements arranged by Prince Abdulaziz and/or Mr Abu-Ayshih; these agreements resulted in some Apex shares in the Company being sold in circumstances where Apex did not receive any of the proceeds of sale, which were instead taken by Prince Abdulaziz or the Company;

vi) In April 2011, following a sale by Apex of some of its shares, Prince Abdulaziz and Mr Abu-Ayshih demanded that Mr Almhairat pay to them a substantial part of the proceeds of that sale; Mr Almhairat did not comply with this demand following

which Prince Abdulaziz and Mr Abu-Ayshih have been hostile to him in a number of ways, including Prince Abdulaziz making a complaint about Mr Almhairat to the Saudi Arabian authorities, leading to the issue of an arrest warrant against Mr Almhairat and the involvement of Interpol. This share sale transaction is the subject of the rival allegation made in the Global Torch petition that the Apex parties have misappropriated funds, namely, the part of the proceeds of sale demanded by Prince Abdulaziz and Mr Abu-Ayshih but not paid to them by Mr Almhairat.

8. The allegations referred to at (ii), (iii) and (iv) of the last paragraph were expressed in anodyne terms because they were essentially the matters which lay at the heart of the application for a private hearing. Two further serious allegations materialised at a later stage. The Judge put a little more flesh on the bones in a confidential schedule to his judgment but he did not need to go into further detail. Nor do I, because the precise details do not matter for present purposes. It is sufficient to state that in their respective petitions each party is making allegations of egregious conduct on the part of the other and each is denying the counter-allegations. The pleading history is set out in paragraphs 9-11 of the judgment of the Judge. Other interlocutory matters have had to be resolved, yet more remained unresolved at the time of the hearing before us. The substantive hearing of the petitions will not take place until early next year.

The applications

9. The applications for a hearing in private were made pursuant to CPR39.2, the material parts of which provide:

> "(1) The general rule is that a hearing is to be in public.
>
> …
>
> (3) A hearing, or any part of it, may be in private if –
>
> (a) publicity would defeat the object of the hearing;
>
> …
>
> (g) the court considers this to be necessary, in the interests of justice."

10. Reliance is placed on both (a) and (g). The associated applications for restrictions to be placed on non-party access to court documents were made pursuant to CPR5.4(C)(4). Guardian News and Media Ltd and The Financial Times Limited (to whom I shall refer, together, as "the Media") are interested parties in relation to the application pursuant to CPR39.2(3). They have also made their own non-party applications for copies of court documents pursuant to CPR5.4(C)(2). In the event, it became common ground at the hearing before us that if the appeal on the private hearing issue was dismissed, the appeal in relation to restriction of access to court documents must also fail. The remainder of this judgment will therefore be devoted to the central issue of open justice.

The judgment below

11. The Judge had little difficulty in rejecting the application pursuant to CPR39.2(3)(a). The case is not concerned with the publication of confidential material or with circumstances where it is necessary to make an order for a hearing in private so that the person on the receiving end of the application does not have the opportunity to frustrate it before it has been made. He was satisfied (at paragraph 64) that the application did not establish that publicity would defeat the object of any of the anticipated hearings.

12. He then focused on the CPR39.2(3)(g) application and the interests of justice. Having considered the open justice principle at common law and the interaction of rights under the European Convention on Human Rights and Fundamental Freedoms (ECHR), in particular Articles 6, 8 and 10, and having addressed the submissions of the parties and the particular circumstances of the case, his ultimate conclusions were expressed in these passages:

> "79. The authorities on the open justice principle are emphatic as to the central importance of that principle in our system of civil and criminal justice … Speaking generally, the consequences for the reputation of individuals are generally not considered to be a sufficient reason for derogating from the open justice principle to the considerable extent of conducting court hearings in private. This indicates to me that the importance which has always been attached, and still is attached, to the open justice principle is comparatively greater than the importance attached to the right to a reputation.
>
> ….
>
> 87 ….I have considered the Applicants' case that justice requires the court to protect their rights under Article 8. Their rights under Article 8 must be balanced against the rights of others under Articles 6 and 10. For that purpose, I have focused on the comparative importance of the rights claimed and the justifications suggested for interfering with or restricting such rights. In this case, having examined the various matters which are relied on, I consider that the importance of the open justice principle is greater that the importance to be attached to the reputations of the Applicants. I consider that it is not necessary in the interests of justice to conduct the relevant hearings in private."

The law

(1) Common law

13. This year marks the centenary of the decision of the House of Lords in *Scott v Scott* (1913) AC 417. It was and remains a beacon of the common law. Outside three exceptional areas of wardship, lunacy and trade secrets (the third being a precursor of CPR39.2(3)(a)), the House of Lords emphasised the paramountcy of open justice. Almost every page of the speeches underwrites that principle. The following extracts will suffice. Viscount Haldane LC stated (at page 438):

> "But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration. The question is by no means one which, consistently with the spirit of our jurisprudence, can be dealt with the by the judge as resting in his mere discretion as to what is expedient. The latter must treat it as one of principle, and as of turning, not on convenience, but on necessity."

He added (at page 439):

> "A mere desire to consider feelings of delicacy or to exclude from publicity the details which it would be desirable not to publish is not, I repeat, enough as the law now stands. I think that to justify an order for hearing in camera it must be shown that the paramount object of securing that justice is done would really be rendered doubtful of attainment if the order were not made."

Lord Atkinson stated (at page 463):

> "The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to be found, on the whole, the best security for the pure, impartial and efficient administration of justice, the best means for winning for it public confidence and respect."

Perhaps the most trenchant observations were those of Lord Shaw of Dunfermline who referred (at page 476) to

> "A violation of that publicity in the administration of justice which is one of the surest guarantees of our liberties, and an attack upon the very foundations of public and private security."

In criticising the closure of the hearings below he said (at page 477):

> "What has happened is a usurpation – a usurpation which could not have been allowed even as a prerogative of the Crown, and most certainly must be denied to the judges of the land. To remit the maintenance of constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand."

Since *Scott v Scott* the common law has remained resolute, subject to later exceptions provided for by statute, none of which arises in the present case.

14. The last authoritative consideration prior to the coming into force of the Human Rights Act 1998 was *Regina v Legal Aid Board, ex parte Kaim Todner* [1999] QB 966 in which Lord Woolf MR said (at page 977E-G):

> "The need to be vigilant arises from the natural tendency for the general principle to be eroded and for exceptions to grow by accretion as the exceptions are applied by analogy to existing cases. This is the reason it is so important not to forget why proceedings are required to be subjected to the full glare of a public hearing. It is necessary because the public nature of the proceedings deters inappropriate behaviour on the part of the court. It also maintains the public's confidence in the administration of justice. It enables the public to know that justice is being administered impartially. It can result in evidence becoming available which would not become available if the proceedings were conducted behind closed doors or with one or more of the parties' or witnesses' identity concealed. It makes uninformed and inaccurate comment about the proceedings less likely. If secrecy is restricted to those situations where justice would be frustrated if the cloak of anonymity is not provided, this reduces the risk of the sanction of contempt having to be invoked, with the expense and the interference with the administration of justice which this can involve … Any interference with the public nature of court proceedings is therefore to be avoided unless justice requires it."

(2) <u>ECHR</u>

15. Three Convention rights can be engaged and require reconciliation in this context. Whereas the common law was undeveloped or underdeveloped in relation to the protection of privacy prior to the coming into force of the Human Rights Act, this is an area where it has made a significant impact. I refer to the three relevant rights.

16. <u>First</u>, there is the right to a fair trial under Article 6, which entitles everyone to "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". Article 6.1 goes on to provide:

> "Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a

> democratic society, where the interests of juveniles or protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

17. Secondly, Article 8 provides the qualified right to respect for private and family life. The qualification in Article 8.2 is that there may be interference with the right if it is

> "… in accordance with the law and it is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or the protection of the rights and freedom of others."

18. Thirdly, there is the right to freedom of expression provided by Article 10. This, too, is a qualified right, Article 10.2 providing:

> "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

19. Much of the early consideration of the relationship between these potentially conflicting rights was in the context of Articles 8 and 10. In *Campbell v MGN Limited* [2004] 2 AC 457, Lord Hoffmann said (at page 56):

> "But when press freedom comes into conflict with another interest protected by the law, the question is whether there is a sufficient public interest in that particular publication to justify curtailment of the conflicting right."

20. In *Re Guardian News and Media Limited* [2010] 2 AC 697, Lord Rodger said (at paragraph 52):

> "In the present case M's private and family life are interests which must be respected. On the other side, publication of a report of the proceedings, including a report identifying M, is a matter of general, public interest. Applying Lord Hoffmann's formulation, the question for the court accordingly is whether there is sufficient general, public interest in publishing a report of the proceedings which identifies *M* to justify any resulting curtailment of his right and his family's right to respect for their private and family life."

As is apparent, there the issue was anonymity rather than a hearing in private. I should also refer to *In re S (a child)* [2005] 1 AC 593, where Lord Steyn, having referred to *Campbell*, said (at paragraph 17),

> "What does, however, emerge clearly from the four opinions are four propositions. First, neither article [8 or 10] has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justification for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test."

21. The more recent developments in this area of the jurisprudence have been in the context of what are sometimes called or miscalled superinjunctions. In *Donald v Ntuli* [2011] 1 WLR 294, this court discharged the superinjunction element of the order which had been made in the High Court. In rejecting a submission in support of restriction, I said:

> "51. … [counsel] seeks to fortify [his] submission by inviting us to dilute the test of necessity referred to in the earlier authorities on the basis that they preceded the Human Rights Act 1998 which, in providing for competing qualified rights (private life and freedom of expression), requires a more nuanced approach …
>
> 52. In my judgment, there is no need for a new approach. Indeed, it is significant that Article 6 … itself prescribes a test of strict necessity in the context of publicity being permitted to be restricted in the interests of justice. However, as part of its consideration of all the circumstances of the case, a court will have regard to the respective and sometimes competing Convention rights of the parties."

22. As a result of the plethora of cases which were coming before the courts at that time, on 1 August 2011 Lord Neuberger MR issued Practice Guidance [2012] 1 WLR 1003. It set out "recommended practice regarding any application for interim injunctive relief in civil proceedings to restrain the publication of information: an interim non-disclosure order". It also provided "guidance concerning the proper approach to the general principle of open justice in respect of such applications". Under the heading "Open Justice", it described open justice as "a fundamental principle" and referred to Article 6.1, CPR39.2 and *Scott v Scott*. The following subsequent passages are relevant:

> "10. Derogations from the general principle can only be justified in exceptional circumstances, when they are strictly necessary as measures to secure the proper administration of justice … Derogations should,

where justified, be no more than strictly necessary to achieve their purpose.

11. The grant of derogations is not a question of discretion. It is a matter of obligation and the court is under a duty to neither grant the derogation or refuse it when it has applied the relevant test …

12. There is no general exception to open justice where privacy or confidentiality is in issue. Applications will only be heard in private if and to the extent that the court is satisfied that by nothing short of the exclusion of the public can justice be done. Exclusion must be no more than the minimum strictly necessary to ensure justice is done and parties are expected to consider before applying to such an exclusion whether something short of exclusion can meet their concerns. … Anonymity will only be granted where it is strictly necessary, and then only to that extent.

13. The burden of establishing any derogation from the general principle lies on the person seeking it. It must be established by clear and cogent evidence: *Scott v Scott* …

14. When considering the imposition of any derogation from open justice, the court will have regard to the respective and sometimes competing Convention rights of the parties as well as the general public interest in open justice and in the public reporting of court proceedings. It will also adopt procedures which seek to ensure that any ultimate vindication of Article 8 of the Convention, where that is engaged, is not undermined by the way in which the court has processed an interim application. On the other hand, the principle of open justice requires that any restrictions are the least that can be imposed consistent with the protection to which the party relying on their Article 8 Convention right is entitled …"

It is pertinent to note that the Practice Guidance was issued very close in time to the robust reaffirmation of the principle of open justice, albeit in somewhat different circumstances, by the Supreme Court in *Al Rawi v Security Service* [2012] 1 AC 531.

The grounds of appeal

23. In his elegant submissions, Mr Mark Warby QC emphasised the following propositions. First, the Judge wrongly treated the open justice principle as inherently superior to, or meriting more weight than, competing Article 8 rights. The open justice principle at common law was established before the coming into force of the Human Rights Act and the *Scott v Scott* line of authority does not require a balance to

be struck between open justice and Article 8 rights in the way in which recent cases on privacy and confidential information do. Secondly, the Judge did not apply the approach mandated by *Guardian News and Media*. Thirdly, he failed to carry out a balanced assessment of whether, and if so to what extent, the open justice principle and Article 10 rights required the curtailment of the appellants' Article 8 rights, in particular their reputational rights, in the specific circumstances of this case. Fourthly, he failed to give due weight to the appellants' Article 6 fair trial rights in the sense that it is their case that the respondents' purpose in making allegations of egregious misconduct is abusive and designed to extort an unfair settlement or withdrawal. Fifthly, the case should be seen as one in which the appellants are seeking protection on an interim basis in circumstances where they are at risk of irremediable damage. Sixthly, upon a proper application of the correct approach, the only outcome is the grant of the protection sought by the appellants.

Discussion

24. The complaint that the Judge treated open justice as an inherently superior consideration is said to be apparent from passages in the judgment, especially this one:

> "79. The authorities on the open justice principle are emphatic as to the central importance of that principle in our systems of civil and criminal justice … Speaking generally, the consequences for the reputation of individuals are generally not considered to be a sufficient reason for derogating from the open justice principle to the considerable extent of conducting court hearings in private. This indicates to me that the importance which has always been attached, and still is attached, to the open justice principle is comparatively greater than the importance attached to the right to a reputation."

I have emphasised the word "generally".

25. In my judgement, it is wrong to say that the Judge was according the open justice principle inherent superiority as a matter of law. In this and similar passages he was expressing himself descriptively rather than prescriptively. In effect, he was saying that, in general, and after consideration of the detail of a particular case, the open justice principle prevails. Indeed, he explained (at paragraph 76) that he was endeavouring to apply the approach set out in the speech of Lord Steyn in *Re S*, the first proposition of which was:

> "… neither Article [8 nor 10] has as such precedence over the other."

The emphasis is Lord Steyn's. Thus, the competing rights do not exist within a presumptive legal hierarchy but that does not mean that in given situations – for example, open justice versus reputational damage – one will not generally trump the other. What is important is that a judge approaches the balancing exercise in the correct way in the circumstances of the particular case.

26. This brings me to Mr Warby's second point, the complaint that the Judge failed to apply *Guardian News and Media* by asking the question: is there, in this case, sufficient public interest in maintaining the open justice principle to justify the resulting curtailment of the appellants' reputational rights under Article 8? I do not consider that this complaint is sustainable. Whilst it is true that the Judge did not expressly set his consideration of the competing rights in the matrix of *Guardian News and Media* (which he referred to on another issue), he did approach his task by reference to *Re S*. I set out Lord Steyn's four propositions earlier (at paragraph 20) and I have referred again to his first proposition in the last paragraph. In my judgment, if a judge has adhered to those propositions he will also have asked the *Guardian News and Media* question, originally derived from *Campbell*, of whether there is a sufficient public interest in maintaining the open justice principle to justify curtailment of the competing right. He will have ensured "an intense focus on the comparative importance of the specific rights being claimed in the individual case"; he will have taken into account "the justifications for interfering with or restricting each right"; and he will have applied the proportionality test to each. For these reasons, I reject the submission that the Judge misdirected himself as to the law.

27. I should add that Lord Steyn's reference to "an intense focus" does not mean that every time a litigant waves an Article 8 flag in support of an application for a private hearing there will have to be a protracted and expensive hearing to determine the issue. Often, indeed usually, experience suggests that the application can be determined very quickly. It also shows that, in most cases falling outside the area of recognized exceptional circumstances (which will often fall within CPR39.2(3)(a)), the open justice principle will prevail.

28. In their submissions, Mr Robert Howe QC (for the respondents) and Mr Guy Vassall-Adams (for the Media) submitted that Mr Warby's reliance on some of the more recent privacy, confidential information or blackmail-related authorities is misplaced. Cases such as *AMM v HXW* [2010] EWHC 2457 (QB), *H v News Group Newspapers Ltd* [2011] 1 WLR 1645 and *ZAM v CFW* [2013] EWHC 662 (QB) involve circumstances in which full insistence on open justice would run the risk of undermining the very right which the proceedings were designed to vindicate. Quite often, they are CPR39.2(3)(a) cases as much as CPR39.2(3)(g) cases. The present case is in very different territory. It is concerned with allegations and counter-allegations of commercial misconduct, absent any element of confidential information. Open justice will not affect the legal value of the disputed rights and obligations. As with many civil and most criminal cases, grave allegations have been made. The judicial process will determine whether and to what extent they are established. Public airing of the allegations may embarrass one side or the other. It often does, but that is not in itself a good reason to close the doors of the court.

29. Having directed himself correctly as to the law, can it be said that the Judge then failed to apply that law? I am satisfied that it cannot. His conclusions at paragraph 87 (see paragraph 12, above) are entirely referable to the correct legal framework. They resulted not from an unconsidered application of the law but only after a conscientious consideration of the particular circumstances of this case. As he had said (at paragraph 76):

> "In carrying out the balancing exercise, I need to address the various matters relied upon by the Applicants, in particular,

> those which are the subject of [their solicitor's] ninth witness statement."

As I am satisfied that that is precisely what he did, I do not consider that there is anything in Mr Warby's third submission.

30. The central feature of that submission is that the Judge did not give due consideration to the Princes' reputational rights. Mr Howe and Mr Vassall-Adams seek to make light of this aspect of the case by pointing to the thinness of the evidence on reputation which is to be found in assertions made by the Princes' solicitor. That seems to me to be too technical an approach. It does not require a leap of imagination to appreciate that, if the allegations of grave misconduct are false, they are likely to cause reputational damage when first publicised. However, it is obvious that the Judge had this well in mind. He said (at paragraph 78):

> "… I am prepared to assume that … the disputed allegations, if false, could be sufficiently serious attacks on the reputation of the of the Applicants … as to have an inevitable direct effect on their private lives so as to affect their personal integrity."

Mr Warby was critical of this being formulated in the language of assumption but it seems to me that the Judge was simply emphasising that, at this stage, he was in no position to make specific findings.

31. Mr Warby's fourth submission was to the effect that the respondents are using these proceedings abusively in order to extort an unwarranted settlement. The Judge dealt with this in the following passages:

> "85. … The difficulty with that submission is that many of the facts relied upon by the Appellants are disputed and those disputes of fact cannot be resolved on this application. They allege that the Apex parties have fabricated documents and made up allegations and, having done so, have threatened to give wide and damaging publicity to the allegations with a view to extorting money from their victims, the Applicants. The Apex parties contend that the Applicants have been guilty of serious wrongdoing, that the Apex parties have come to a court of justice to seek appropriate redress and are prepared to settle the claim for a sum which reflects the strength of their claim. The Apex parties would say that they are not doing anything inappropriate in expecting the court to act in the normal way by holding court hearings in public. Nor are the Apex parties doing anything inappropriate, particularly in the context of cross-examination under section 994 of the 2006 Act, in making it clear that they are prepared to settle on what the Apex parties will say are fair terms. If the Applicants are concerned about publicity, particularly publicity for allegations which the Apex parties say they will prove, and if the

> Applicants are the more willing to be realistic about offering to settle the claim, then the Apex parties are not doing anything wrong in hoping that that will happen.
>
> 86. If I were able to determine at this interlocutory stage that the Apex parties were knowingly putting forward false claims and were abusing the process of the court by seeking to take advantage of the Applicants' concern about publicity in relation to false allegations, then I would be very concerned and would have to consider what relief to grant to protect the victims of abusive behaviour. However, it is wholly unrealistic for the Applicants to submit that I can form that view on the material before me and grant relief accordingly."

I should add that that material includes a strong denial by Mr Almhairat that he has done anything designed to generate publicity for his allegations.

32. I find nothing erroneous in the Judge's approach. He was considering the matter as a prelude to a further hearing which would be concerned with, among other things, a jurisdiction application at which the Princes and Mr Abu Ayshih were proposing to argue (and subsequently did argue) that service out of the jurisdiction on them should not be upheld because (they argued) the factual allegations made by the Apex parties did not have a real prospect of success of being upheld at trial. At the time of the hearing of this appeal that further hearing had not yet taken place. However, it later took place before Vos J on 21-23 May and, on 20 June, he gave judgment in favour of the Apex parties, rejecting a submission that he should find their allegations "far-fetched, incredible and fanciful": [2013] EWHC 1652 (Ch), at paragraph 145.

33. When the open justice point was being argued before the Judge, the position was no different from that which is present in many cases, civil or criminal. There are allegations and counter-allegations of serious misconduct. A person on the receiving end of such allegations will always be at significant risk of reputational damage. However, if the allegations are false, he will obtain his vindication through the judicial process, if not as a result of interlocutory application, then after a trial. The Judge had this well in mind: see paragraphs 82-83.

34. Mr Warby attempted to respond to this analysis by an alternative submission whereby he contended that, at the interlocutory stage, the open justice principle might yield to the right to privacy and protection of reputation on the basis that the putative victim has at least an arguable case. This links with his fifth submission that the open justice principle can safely be mollified at the interim stage because, if the allegations are later found to be true at trial, publicity can follow, with the result that a temporary suspension of open justice will have done no harm. I can see no warrant for a general lowering of the bar. Outside the area of statutory or other established exceptions, the open justice principle has universal application except where it is strictly necessary to depart from it in the interests of justice. If an application for departure is made, it will fall to be decided by reference to the principles which I have been considering, whether the proceedings are at an interim or final stage. In the field of defamation,

where the ultimate issue is reputational damage, the courts do not generally grant injunctions to restrain publication pending trial: *Bonnard v Perryman* [1891] 2 Ch 269. Sometimes a degree of protection is necessary on an arguable basis, for example so as to protect against blackmail: see *ZAM v CFW* [2013] EWHC 662 (QB). However, the basis there is a case-specific analysis which results in the need for a degree of protection so as to avoid the full application of the open justice principle exposing a victim to the very detriment which his cause of action is designed to prevent. In that sense, it is more akin to a CPR39.2(3)(a) application. If such an approach were to be extended to a case such as the present one, it could equally be applied to countless commercial and other cases in which allegations of serious misconduct are made. That would result in a significant erosion of the open justice principle. It cannot be justified where adequate protection exists in the form of vindication of the innocent through the judicial process to trial.

35. Mr Warby's sixth submission really assumed his success on one or more of his earlier submissions leading to our having to redetermine the application or an assessment that, even if the Judge adopted the correct approach in law, his conclusion was unsustainable in the particular circumstances of this case. He has failed in his earlier submissions and the Judge's conclusion, far from being unsustainable, was, in my judgment inevitable.

Conclusion

36. These are the reasons why I concluded that the appeal should be dismissed.

Lord Justice Richards:

37. I agree.

Lord Justice Briggs:

38. I also agree.